UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

In re: Brian D. Forant, Debtor	:	
Brian D. Forant, Appellant	:	
v.	:	Docket No. 1:03-cv-312
Corinne R. Devenger, Appellee	:	

OPINION AND ORDER

This is a pro se appeal filed by Brian Forant challenging the Bankruptcy Court's decision granting Corinne Devenger summary judgment. For the reasons discussed below, the Bankruptcy Court's ruling is VACATED and REMANDED.

BACKGROUND

On August 5, 2002, Corinne Devenger ("Devenger") initiated this adversary proceeding against her ex-husband, Debtor Brian Forant ("Forant"), seeking to have his obligations to her, as created by a divorce decree, excepted from discharge pursuant to 11 U.S.C. § 523(a)(15). The Bankruptcy Court held a pre-trial hearing on November 19, 2002, at which the court advised both parties of their obligations under the Scheduling Order and encouraged them to retain counsel.

Devenger filed a Motion for Summary Judgment on January 21, 2003. Under the Local Rules, Forant's response to that motion was due on February 10, 2003. See Vt. LBR 7056(a)(2). Forant, however, proceeding pro se, did not provide a timely response. Instead, Forant retained an attorney on February 18, 2003 and moved for an extension to file a response by February 28, 2003.

Citing the "sense of urgency" in Devenger's prayer for relief and stating that "it is incumbent upon courts to manage cases in a way that fosters prompt determinations," the court denied the request for an extension. The court ruled Forant's failure to retain counsel before the deadline did not amount to excusable neglect. While citing the need to provide special accommodation to parties who proceed without the benefit of counsel, the court ruled Devenger had notice of the need to file a timely response, because: (1) he was served with the Scheduling Order which referenced the rules regarding filing, and consequences of failure to comply; (2) the court advised both parties of their obligations under the Scheduling Order at the November 19, 2002 pre-trial hearing; and (3) Forant had experience litigating a divorce proceeding in state court, from which the court inferred he understood the importance of filing court papers on time.

On March 4, 2003, Forant filed a Motion to Reconsider, offering to file a response within 48 hours; the court denied this request. On September 26, 2003, the Bankruptcy Court granted Devenger's motion for summary judgment, which it deemed unopposed.

On appeal, Forant argues, inter alia, that there are material facts in dispute that preclude summary judgment, which would have been apparent had he been given the opportunity to file an opposition.

JURISDICTION

This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 158(a) which gives Federal District Courts authority to hear appeals from final judgments, orders and decrees of bankruptcy judges entered in "core proceedings" involving purely bankruptcy matters. See, e.g., Riendeau v. Canney (In re Riendeau), 293 B.R. 832, 835 (D. Vt. 2002).

STANDARD OF REVIEW

This Court reviews the Bankruptcy Court's findings of fact under a "clearly erroneous" standard, In re United States Lines, Inc. v. American Steamship Owners (In re United States Lines), 197 F.3d 631, 640-41 (2d Cir. 1999). The Bankruptcy Court's conclusions of law are reviewed de novo, as are mixed

questions of fact and law. See 197 F.3d at 640-41.

DISCUSSION

A summary judgment motion filed against a pro se party may be granted as unopposed if: (1) the pro se party has received adequate notice of the consequences of failing to respond, and (2) the court is satisfied there are no material facts in dispute. See Champion v. Artuz, 76 F.3d 483, 486 (2d Cir. 1996). In such cases, a pro se party must be given express notice of the consequences of failing to respond appropriately. See, e.g., Irby v. New York City Transit Auth., 262 F.3d 412, 413-14 (2d Cir. 2001) (holding that pro se litigants must "have actual notice, provided in an accessible manner," of the consequences of failing to respond to a summary judgment motion). Either the court or the moving party is to supply the pro se litigant with notice. Id.

Based on a review of the record, it is not clear to this Court that Forant, proceeding pro se during the pendency of Devenger's motion, had adequate notice of the consequences of failing to respond. This Court is not persuaded the initial Scheduling Order and general reminder of obligations that followed on November 19, 2002, provided sufficient notice of the specific consequences of failure to respond to Devenger's motion filed in January 2003. Also, this Court does not

accept the position that Forant's prior pro se experience in state court provided him with notice of consequences of failure to respond. Lastly, while the Bankruptcy Court was correct in considering the possibility of intentional delay, this Court finds an extension of only 18 days hardly evidences an intent to "exploit" the legal system as the court suggests, particularly when the extra time is used by a pro se litigant to retain counsel and oppose summary judgment.

The case relied upon by the Bankruptcy Court in treating Devenger's summary judgment motion as unopposed is instructive. See Warren v. Chem. Bank, 1999 WL 1256249, at *2 (S.D.N.Y. 1999). After the pro se litigant in Warren failed to file a timely response to a summary judgment motion, the court issued an order directing him to respond within 45 days and expressly warned him that judgment may be entered against him in the absence of response. Id. Despite citing to Warren, the court did not provide express notice commensurate with Warren.

CONCLUSION

The decision of the Bankruptcy Court granting summary judgment unopposed is VACATED and REMANDED for further proceedings consistent with this Opinion.

SO ORDERED.

Dated at Brattleboro, Vermont this __ day of February, 2004.

_____
J. Garvan Murtha, U.S. District Judge